IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-264

ROBERT K. SWISHER, JR.,
Petitioner,

versus

THE STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals For the State of Texas

PETITIONER'S BRIEF IN REPLY TO THE STATE OF TEXAS BRIEF IN OPPOSITION

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The Petitioner, JOHN DAVID MOORE, JR., having filed his Petition For A Writ of Certiorari and having received the brief of the State of Texas in opposition, respectfully submits his reply to the brief of the State of Texas in opposition.

OPINIONS BELOW

The judgment and sentence of the jury entered on June 20, 1974 in this cause in the 34th District Court of the State of Texas is included in Appendix B of the Petition For a Writ of Certiorari.

The opinion of the Court of Criminal Appeals of the State of Texas delivered on May 26, 1976 and affirming the District Court judgment, cause number 50,099, ____ S.W.2d ____, has been reproduced in Appendix C of the Petition For a Writ of Certiorari.

The official notice of the denial of the Appellant's Motion For Leave to file Petition for Rehearing from the clerk of the Court of Criminal Appeals dated June 16, 1976 appears in Appendix D of the Petition For a Writ of Certiorari.

The per curiam order of the Court of Criminal Appeals, granting the Appellant's Motion to Stay Execution of Mandate dated June 28, 1976 is included in Appendix E of the Petition For a Writ of Certiorari.

JURISDICTION

The Judgment of the Court of Criminal Appeals of the State of Texas was on May 26, 1976. A Motion for Leave to File Petition for Rehearing was timely filed, and denied on June 16, 1976. This Petition for Certiorari was timely filed within ninety (90) days of both the above dates. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

I.

Whether a delay of thirty-six (36) months during which the State failed to notify the accused or his attorney of the resumed prosecution against him constitutes a denial of speedy trial and due process.

II.

Whether a general, undetailed tip from an untested informant who did not give the source of his information could support the stop and search of the Petitioner's moving vehicle.

CONSTITUTIONAL PROVISIONS INVOLVED

The following portion of the Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

The following portion of the Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, . . . without due process of law, . . ."

The following portion of the Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons . . . and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, . . ."

REPLY TO THE ARGUMENT OF THE STATE OF TEXAS

(1) Whether A Delay Of Thirty-six (36) Months During Which The State Failed To Notify The Accused Or His Attorney Of The Resumed Prosecution Against Him Constitutes A Denial Of Speedy Trial And Due Process.

In dealing with the Petitioner's first question above, the State of Texas put forth three main ideas in rebuttal: (1) That during the thirty-six (36) month period between arrest and the issuance of a fugitive warrant, the Defendant was, or was considered to be, a "fugitive" (Resp. 5); (2) that notice of the resumed prosecution to the Defendant's bondsman was sufficient (Resp. 5); and (3) that the Defendant failed to prove prejudice from the delay (Resp. 5-6).

A.

There is simply no evidence that Robert K. Swisher was ever considered a fugitive as alleged in the State's Brief (Resp. 4). First of all, the arrest capias of November 19, 1970 (Resp. 2) which was returned "unserved" and with the notation "continued on bond" does not appear in the appellate record at all (see R. 378-385). No arrest capias appears in the record until the end of the thirty-six month period (R. 385). As for the arraignment setting which prompted the bond forfeiture, no notice of it appears in the record (R. 378-385), in sharp contrast to the notices issued after the

thirty-six month period which are included in the appellate record (R. 388, R. 389, R. 390). Thus, the documentary record offers silent but clear support of the Defendant's contention that he was denied notice and due process.

The testimony also does not support the contention that the State of Texas "considered" Robert K. Swisher, Jr. a "fugitive." (Resp. 5) The Defendant testified that he had no knowledge of the resumed prosecution (Tr. 78-100, 114-116); his attorney testified that he had not received any such indication (Tr. 118-121); and even more importantly three Assistant District Attorneys for the State were called to the stand and in their testimony (Tr. 60-74, 142-154, 136-142, 155-158) failed to make even the assertion that Robert Swisher, Jr. was "considered" a "fugitive." In a somewhat unusual procedure, the trial attorney for the State, Mr. Albert Weisenberger took the stand himself, but he too did not characterize the Defendant as being "considered" a "fugitive" before December, 1973 (Tr. 116-118), nor did he make such a characterization in his final argument (Tr. 177-180) against the Defendant's motion to dismiss for lack of a speedy trial. Counsel for Defendant apologizes for subjecting this august body to such a mass of citations to the record and the transcript, but feels compelled to do so in order to rebut this rather late and inaccurate assertion by the State which tends to obscure the important legal issues involved in this case.

B.

As for the State's assertion that the notice of the resumed prosecution which was supposedly given to the Defendant's bondsman was adequate notice, the Petitioner would like to make two brief points. First, there is no indication in the record of any notice being given of the resumed prosecution to the Defendant or his bondsman until December, 1973 (R. 378-385). The *Judgment Nisi* (R. 384) regarding the bond forfeiture does not reflect that it was delivered to the bondsman, and the record is silent as to even an attempt at execution upon that judgment (R. 378-385). Secondly, and even more importantly, there is no support in the body of the law for the idea that a Defendant's constitutional right to notice and due process can be delegated to a bondsman and become dependent on his industry or lack of same. All in all, neither the facts nor the law lends any credence to the State's assertion that this Defendant received notice of the resumption of prosecution in his case.

C.

The State of Texas contends that the Petitioner failed to adequately prove that he was prejudiced by the thirty-six (36) month hiatus in his case. The State is able to maintain this position only by failing to come to grips with the Petitioner's contentions that such a lengthy delay creates a presumption of prejudice. *United States v. West*, 504 F.2d 253 (D.C. App. 1974); *United States v. Macino*, 486 F.2d 750 (7 Cir. 1973); *United States v. Calloway*, 505 F.2d 311 (D.C. App. 1974); and that only a showing of "a reasonable possibility of

significant prejudice" is necessary, *United States v. Holt*, 448 F.2d 1108 (1971); *Harling v. United States*, 401 F.2d 392, (D.C. App. 1968) cert. den. 393 U.S. 1068, 89 S.Ct. 725, 21 L.Ed. 711 (1969). Additionally, Petitioner would reassert his position that he has been subjected to significant prejudice from his thirty-six month delay, specifically in securing witnesses for cause both on the merits and on punishment (Tr. 83-92); and in being denied the right to order his life by the failure of the State of Texas to notify him or his attorney of the resumption of prosecution for some three years, thus denying him even the right to demand a speedy trial.

This Court has held that a showing of actual prejudice is not sine qua non for demonstrating a denial of speedy trial, *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973); nonetheless, in this case, the Petitioner feels he has demonstrated a "reasonable possibility of significant prejudice," *Holt, Supra; Harling, Supra.*

(2) Whether A General, Undetailed Tip From An Untested Informant Who Did Not Give The Source Of His Information Could Support The Stop And Search Of The Petitioner's Moving Vehicle.

In replying to the brief treatment of the above search question by the State of Texas, the Petitioner would make two points: (1) that the facts supporting the officer's suspicions are not as strong as the State would have us believe; and (2) that legal precedents cited by the State in support of its contention that the insufficient tip was rehabilitated or corroborated by surveillance are not applicable to the facts of this case.

A.

In regard to the facts available to the Police Officer, the State contended that upon the surveillance of Robert Swisher's vehicle, the Officer "judged these packages to contain marijuana," (Resp. 4). After noting that this Officer's view of the packages was in the dark between two moving cars, and with the aid of a flashlight, the Petitioner would point out the Officer's actual testimony as to the composition and appearance of the "packages."

A. I don't believe a bag, just cellophane wrapping.
Q. All right. Now is the brown paper transparent?
A. No sir, it is brown wrapping paper as used in the meat market, or brown shopping bags.
Q. In other words, if you picked it up you would not be able to see the vegetation inside?
A. That is correct, you would not.
Q. You say it also had a plastic wrapping around the brown paper.
A. To the best of my recollection, yes it did.
Q. Are you certain about that?
A. Not 100% certain, no sir.
Q. Are you certain that all of these packages had this brown paper on them?
A. Yes sir. (TR 43)

Indeed, the Officer went on to say that he had seen marijuana packaged that way, but he added in the

same breath that he was "sure" that other items could be wrapped that way (TR 32).

B.

The State's precedent for contending that its insufficient tip was rehabilitated was *United States v. Waddy*, 536 F.2d 632 (5th Cir. 1976) cited in the State's Brief as *United States v. Waddey* (Sic), 436 (Sic) F.2d 632 (5th Cir. 1976). (Resp. 8) *Waddy* and its cited precedent, *Weeks v. Estelle*, 531 F.2d 780 (5 Cir. 1976), involve a different fact situation than that found in *Swisher*. *Waddy* and *Weeks* involve *reliable* informants giving insufficient tips, not an untested informant giving an insufficient tip as is the case in *Swisher*. However, even if one were to use *Waddy* as a precedent, it would not support a finding of probable cause. Actually, the closest case, *United States v. Bursey*, 491 F.2d 531 (5 Cir. 1974) is cited in *Waddy*, but distinguished from the *Waddy* facts. The *Bursey* court cited *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and pointed out:

> "Moreover, the surveillance in this case, as in *Spinelli*, contained no reasonable suggestion of criminal conduct when the appellants' actions as observed are simply taken by themselves, and *Spinelli* clearly teaches that otherwise innocent conduct is not imbued with "an aura of suspicion by virtue of the informer's tip" where the tip fails to comport with the *Aguilar* requirements. *Spinelli*, *supra*, at 418, 89 S.Ct. 584, 590. Changing drivers in a public parking lot in broad

> daylight and an impression by an agent at the end of a long night's vigil that a car trunk was sagging more than it had the night before simply cannot, in themselves, warrant a finding of probable cause." *Bursey*, at 534.

In *Swisher*, instead of a sagging trunk, we have cellophane and the sort of "brown wrapping paper used in the meat market," (TR 43).

Thus, the *Swisher* facts fail to meet even the requirements of *Waddy*, *Weeks*, and *Bursey*. However, the Petitioner would point out again that *Waddy*, *Weeks*, *Bursey*, and *Spinelli* involve *reliable* informants giving tips which are insufficient in some manner under the *Aguilar* test. In *Swisher*, we have entirely different facts which can be summarized as follows:

1. An untested informant. (TR 17)

2. No assertion by the Police Officer that he was reliable. (TR 11-17)

3. A general, undetailed tip. (TR 11-17)

4. No information as to how the informant gained his information. (TR 17)

5. No information as to when the informant gained his information or whether it was stale or not. (TR 17)

We can see that the above tip is not an *Aguilar* tip at all because it fails to meet the requirements of either prong or any portion thereof. *Swisher* is the case of an untested informant giving a totally insufficient tip.

Strangely enough, this tip's inadequacy, its failings, its very generality is all that supports the State's claim to any corroboration at all. For instance, in *Waddy*, the "reliable" informant mentioned "that the marijuana was going to be carried in suitcases," *Waddy*, at 633. The *Swisher* informant failed to advise the Officer how the marijuana would be carried, contained, packaged or whatever. In *Waddy*, the Officers noted the presence of suitcases in their surveillance, and those suitcases provided part of the corroboration. In *Swisher*, suitcases, a sagging trunk, extra spare tires, brown packages, or virtually anything the Officer encountered would tend to be somewhat corroborative, simply because of the very inadequacy and generality of the tip. Can it be that the worst possible tip is the one easiest to corroborate? Surely, this cannot be the case.

FINAL ARGUMENT AND CONCLUSION AS TO WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

Looking at the question of whether this Petitioner was denied a speedy trial in this instance, we find an interesting fact situation. In *Swisher*, the defendant was denied a speedy trial for some thirty-six (36) months, and because of the lack of notice on the part of the State of Texas as to its resumption of prosecution, he was also denied the right even to request a speedy

trial. The Petitioner feels that this novel fact situation provides an appropriate and compelling reason for review by this Court.

The second issue concerns itself with the question of whether a general, undetailed tip from an untested informant who did not give the source of his information can support the stop and search of the Petitioner's vehicle, and the question of whether such a grossly inadequate tip can be rehabilitated by the observation of activities and items which could be innocent except when "endowed with an aura of suspicion by virtue of the informer's tip." *Spinelli*, 393 U.S. at 419. If we allow the *Swisher* tip to be rehabilitated thusly, we must completely give up the concerns of *Aguilar* and *Spinelli* that tips might be made up from rumor or out of whole cloth by the informer or others. Realizing this, this Petitioner appeals to this Court in its role as guardian of the Bill of Rights, and requests review under a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of December, 1976.

Of Counsel